Filed 1/17/19 P. v. Moran CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ANGEL MORAN, Defendant and Appellant.	F075585 (Super. Ct. No. BF164480A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Thomas S. Clark, Judge.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman, Michael Dolinda, and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Franson, J. and Smith, J.

On April 5, 2017, a jury convicted appellant Michael Angel Moran of transportation of methamphetamine (Health & Saf. Code,[1] § 11379, subd. (a); count 1) and possession for sale of methamphetamine (§ 11378; count 2).

On appeal, Moran contends: (1) one of his conditions of probation is constitutionally vague and overbroad; (2) the minute order for his sentencing hearing contains an error; and (3) the court erred when it imposed penalty assessments on the drug fees it imposed. We find merit to Moran's first two contentions, modify the judgment accordingly, and affirm the judgment as modified.

FACTS

On June 7, 2016, shortly after 8:00 p.m., after seeing the front passenger of a Chevrolet enter an apartment and exit two minutes later, Kern County Sheriff's deputies stopped the car, which was driven by codefendant Joshua Robinson with Moran seated in the front passenger's seat. During a search of the car, in the center console, deputies found methamphetamine in a baggie with a total weight of 29.4 grams. In a backpack, they found methamphetamine in a baggie with a total weight of 20 grams, methamphetamine in another baggie with a total weight of 38.2 grams, and a digital scale. During a search of Moran, the deputies found $2,792 in cash. Five grams of methamphetamine, security cameras, packaging material, a methamphetamine pipe, and a scale were found during a search of the apartment Moran entered prior to the traffic stop.

At trial, a deputy testified as an expert that the methamphetamine was possessed for sale.

DISCUSSION

As a condition of probation, the court ordered Moran "to absolutely refrain from the use and possession of and not to have under his control any narcotic, restricted dangerous drug, marijuana, or hallucinogenic drugs, and not to associate or be with any

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[1] All references are to the Health and Safety Code, unless otherwise noted.

person known by him to be engaged in the use, possession or control of such substances." Moran contends this condition is unconstitutionally vague and overbroad because it does not include an exception for drugs ordered by a doctor and should be limited to those narcotics that are used or possessed without a doctor's prescription. We agree.

A trial court has "broad discretion" to prescribe probation conditions in order to foster rehabilitation and protect public safety. (*People v. Martinez* (2014) 226 Cal.App.4th 759, 764.) However, such conditions may be challenged for being unconstitutionally overbroad and vague. (*People v. Freitas* (2009) 179 Cal.App.4th 747, 750.)

"A probation condition 'must be sufficiently precise for the [defendant] to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a [constitutional] challenge on the ground of vagueness. [Citation.] A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as constitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890. (*Sheena K.*)) A reviewing court is authorized to modify conditions of probation when necessary to correct such constitutional infirmities. (*Id*. at p. 892; *People v. Turner* (2007) 155 Cal.App.4th 1432, 1436.)

A probation condition may be overbroad "if in its reach it prohibits constitutionally protected conduct." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115.) "[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' " (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

The probation condition at issue is unconstitutionally overbroad because it prohibits Moran from possessing narcotics and other drugs even if prescribed a by a physician. Respondent, however, cites *People v. Olguin* (2008) 45 Cal.4th 375, for the proposition that a probation condition should be given the meaning that would appear to a reasonable objective reader. According to respondent, a reasonable reader would not

interpret the condition at issue "to mean a prohibition on legally prescribed medications" and it should not be assumed that a probation officer will act irrationally or capriciously in interpreting the condition. We disagree because " 'the rule that probation conditions that implicate constitutional rights must be narrowly drawn, and the importance of constitutional rights, lead us to the conclusion that this factor should not be left to implication.'" (*People v. Garcia* (1993) 19 Cal.App.4th 97, 102.)

Moreover, as noted above, the second part of the challenged condition prohibits Moran from associating or being with "any person known by him … to be engaged in the … use, possession or control of [any narcotics, restricted dangerous drugs, marijuana, or hallucinogenic drugs]." The parties did not address whether this portion of the challenged condition is constitutionally overbroad. Nevertheless, in the interest of judicial economy, we address this issue without requesting supplemental briefing because it is part of the challenged condition before us and it raises the same issue as the challenged part of the condition. Further, the second part of the challenged condition prohibits Moran from associating with anyone who uses, possesses, or has control of any of the substances identified in the condition even if they have a prescription for the substance. Thus, we conclude that this portion of the challenged condition is also constitutionally overbroad, and we will modify the challenged condition to eliminate its constitutional overbreadth.[2]

The Minute Order

At the beginning of the sentencing hearing, after the court announced its tentative decision to place Moran on probation, defense counsel asked the court to allow Moran to participate in the work release program (Pen. Code, § 4024.2). The court responded that it believed that felony probation with one year incarceration, as recommended by the

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[2] In light of our decision to modify the challenged condition because it is unconstitutionally overbroad, Moran's constitutional vagueness challenge to the condition is moot.

probation department, was a lenient result and that it was not inclined to grant any further leniency.

Defense counsel replied that if Moran was placed in custody he would probably be out of custody and on a monitor sooner than if he were allowed to participate in the work release program. The court agreed that Moran might serve less time if he served his time in custody instead of being released on the work release program and it asked for the People's position on Moran's request. The prosecutor stated that it agreed with the court that incarceration was appropriate.

The court then heard from Moran's father and he asked the court to allow Moran to continue working. The court responded that although the recommendation was for a year in custody, it was very possible that Moran would be released much earlier. Some discussion followed during which Moran's father and defense counsel explained to the court that if incarcerated, Moran would lose his job. The court was unmoved and responded:

> "I am going to follow the recommendation of the probation department *as I indicated*. While I do think there are some reasons to exercise some leniency, in this case, I think the probation department has taken those into account already and that the recommendation is a lenient sentence." (Italics added.)

The court then placed Moran on probation for three years on certain terms and conditions, including that on count 1 he serve the first year of his probation in the Kern County Jail. The court also ordered Moran to "report in person to the probation officer within five days of his release from custody, *even if released to the sheriff's work release program*, and monthly thereafter." (Italics added.)

On count 2, the court also placed Moran on probation for three years on condition that he serve a year in local custody. However, it stayed that sentence pursuant to Penal Code section 654.

The minute order for Moran's sentencing hearing states, in pertinent part, "No work release program allowed" and "Count 2 to be served concurrent with count 1."

Moran contends the oral pronouncement of judgment controls when there is a conflict between the oral pronouncement of judgement and the minute order. Thus, according to Moran, because the court never ordered that he not be allowed to participate in the work release program, the statement, "No work release program allowed," should be deleted from the sentencing hearing minute order. Similarly, because during the oral pronouncement of judgment the court stated that the sentence on count 2 was stayed, the statement in the minute order that a concurrent sentence was imposed on the count should also be deleted. We agree only that the reference to a concurrent sentence should be deleted from the minute order.

"Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385; accord, *People v. Mesa* (1975) 14 Cal.3d 466, 471.)

Although the court did not expressly order that Moran was prohibited from participating in the work release program, a fair reading of the reporter's transcript is that the court implicitly ordered that he not be allowed to participate in that program. Moran cites the court's statement that he was ordered to report to probation within five days of being released from custody, even if he was released to participate in the work release program, to contend that it did not order that he was prohibited from participating in that program. However, when it made this statement the court was merely repeating language used in the probation report and, as discussed above, it is clear from the court's comments that it implicitly ordered that he not be allowed to participate in the work release program. Accordingly, we reject Moran's request to delete this order from the minute order of his sentencing hearing.

Further, during the oral pronouncement of judgment, the court stayed the local term it ordered Moran to serve on count 2 as a condition of probation and it did not mention anything about a concurrent term with respect to that count. Respondent acknowledges the sentencing hearing minute order erroneously states that the court ordered Moran to serve a concurrent term on count 2. Respondent, however, contends the minute order need not be modified because the order also notes that the sentence on count 2 was stayed. We disagree. "The reason for requiring a minute entry of the judgment in a criminal case is to furnish a concise record showing the crime of which the defendant has been convicted and the punishment imposed ...." (*People v. Blackman* (1963) 223 Cal.App.2d 303, 307.) Allowing an error in the minute order to go uncorrected would defeat this purpose. Therefore, we will direct the trial court to issue an amended minute order that does not include this statement.

The Penalty Assessments on Moran's Drug Convictions

At Moran's sentencing hearing the court imposed a $50 laboratory fee and $155 in penalty assessments, and a $100 drug program fee and $310 in penalty assessments on each of his two drug convictions. Moran contends the court erred in imposing the penalty assessments attached to the laboratory fees (§ 11372.5) and the program fees (§ 11372.7) because these fees are not punitive. He relies on *People v. Webb* (2017) 13 Cal.App.5th 486 (*Webb*) [penalty assessments not applicable to program fee] and the analogous cases of *People v. Watts* (2016) 2 Cal.App.5th 223 (*Watts*) [penalty assessments not applicable to lab fee], and *People v. Vega* (2005) 130 Cal.App.4th 183 (*Vega*). We find partial merit to this contention.

Penalty assessments apply to any "fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses" and increase such fines, penalties, or forfeitures by a specified amount. (E.g., Pen. Code, § 1464, subd. (a)(1); Gov. Code, § 76000, subd. (a)(1).) In *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1696 (*Sierra*),

we concluded that the program fee (§ 11372.7) is a fine or penalty to which penalty assessments are applicable.

In *People v. Martinez* (1998) 65 Cal.App.4th 1511, the court applied our reasoning to the lab fee specified in section 11372.5: "Under the reasoning of *Sierra*[, *supra*, 37 Cal.App.4th 1690], we conclude ... section 11372.5, defines the [lab] fee as an increase to the total fine and therefore is subject to penalty assessments under [Penal Code] section 1464 and Government Code section 76000." (*People v. Martinez*, *supra*, at p. 1522; see *People v. Sharret* (2011) 191 Cal.App.4th 859, 869-870 [because lab fee was punitive in nature, court was required to stay its imposition under Pen. Code, § 654]; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1257 [court required to impose state and county penalty assessments on lab fee]; *People v. Sanchez* (1998) 64 Cal.App.4th 1329, 1332 [abstract of judgment had to be amended to include lab fee imposed because it was "an increment of a fine"]; see also *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157 [dictum noting that the trial court "had no choice and had to impose" penalties upon the lab fee].) Some courts, however, have held to the contrary. *Watts*, which itself noted that its holding was "contrary to the weight of authority," held that the lab fee "is not subject to penalty assessments." (*Watts*, *supra*, 2 Cal.App.5th at p. 226; see *Vega*, *supra*, 130 Cal.App.4th at pp. 193-195 [lab fee is not punishment for purposes of Pen. Code, § 182, subd. (a)].)

Recently, in *People v. Ruiz* (2018) 4 Cal.5th 1100, 1119 (*Ruiz*), the Supreme Court held that the laboratory fee and drug program fee were punishment for purposes of the conspiracy statute (Pen. Code, § 182). Although the court declined to decide whether these fees were subject to penalty assessments (*Ruiz*, at p. 1122), it, nevertheless, disapproved of several cases, including *Webb* and *Watts* to the extent they were inconsistent with the court's holding. (*Ruiz*, at p. 1122, fn. 8.) Thus, in accord with *Sierra* and *Martinez*, we conclude that the laboratory and drug program fees are fines or penalties, and that they are subject to penalty assessments.

However, Penal Code section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Penal Code section 654 prohibits the imposition of punitive fines on counts that are stayed pursuant to Penal Code section 654. (*People v. Gonzales* (2017) 16 Cal.App.5th 494, 504-505.) Therefore, since the laboratory and drug program fees are punitive and the court found that Penal Code section 654 applied to count 2, the court erred by its failure to stay the drug fees and corresponding penalty assessments it imposed on that count.

DISPOSITION

The challenged probation condition is modified to read, "Moran is ordered to refrain from the use and possession of, and not to have under his control, any narcotic, restricted dangerous drug, marijuana, or hallucinogenic drugs that has not been furnished to him upon the prescription of a medical practitioner authorized by law to prescribe drugs, and not to associate or be with any person known by him to be engaged in the illegal use, possession, or control of such substances that have not been furnished to the person upon the prescription of a medical practitioner authorized by law to prescribe drugs." The judgment is also modified to stay the laboratory and drug program fees and penalty assessments the court imposed on count 2. Additionally, the trial court is directed to issue an amended minute order for Moran's sentencing hearing that deletes the statement, "Count 2 to be served concurrent to count 1." As modified, the judgment is affirmed.